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SOMETHING OF IMPORTANCE RELATIVE TO RESCISSION OF CONTRACTS.

In the recent edition of Walds' Pollock on Contracts, by Professor Williston of the Harvard Law School, on page 350 we find a criticism of Lord Cockburn's language used in the case of Frost v. Knight, L. R. 7 Ex. 111, 112. In order to more fully understand the position of the learned authors of this great work, we will take the whole statement of Lord Cockburn in that case of which a part is criticised: "The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his own previous repudiation of it, but also take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement of any circumstances which may have afforded him the means of mitigating his loss."

The language criticised is the following: "On the other hand, the promisee may, if he thinks proper, treat the repudiation as a wrongful putting an end to the contract and may at once bring his action as on a breach of it." That is to say, is the criticism of the learned authors, "a contract could not be regarded as at an end and at the same time be made the basis of a suit for damages." While it is true that strictly speaking, Lord Cockburn's language has the constructive import given by the learned authors, yet, at the same time the evident meaning of the language is that, so far as he is concerned (the other party) he puts an end to the contract by his wrongful repudiation. That such construction was put upon it by Mr. Justice Bowen in the case of Johnstone v. Milling cannot be doubted for he says *Id.* p. 473: "In the passage cited by Brother Cotton, from Frost v. Knight, Cockburn, C. J. points out that there are these two alternatives open to the promisee and that it is a condition essential to his right to sue upon a repudiation of the contract before the time for performance as upon a breach that he should thenceforth treat the contract as at an end except for the purpose of being sued upon."

The question might also be raised from Lord Cockburn's language, how would it be possible for a party to afterwards set up performance if his repudiation put an end to the contract. That is to say that when Lord Cockburn says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own," etc. How could he keep it alive if the wrongful repudiation put an end to it? Lord Esher says, in this same case: "In those cases [the court seems to have had under consideration Frost v. Knight, L. R. 7 Ex. 111; Hochster v. De la Tour, 2 E. & B. 678; Danube & Black Sea Co. v. Xenos, 13 C. B. (U. S.) 875 and Cort v. Ambergate Ry. Co.], the doctrine relied on has been expressed in various terms more or less accurately, but I think in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract, is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but so may be acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is by anticipation refuses to perform it, he thereby, so far as

he is concerned, declares his intention then and there to rescind the contract. Such renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission." This seems to us to be the best of all the statements of the law of anticipatory breach.

One of the most celebrated English cases relative to anticipatory breach is that of Withers v. Reynolds, 2 Barn. & Adol. 882, in which there was an agreement to furnish straw, by one party, at stated periods to be paid for upon delivery; after a portion of it had been delivered, the party to whom delivery was being made said: "I will not pay for this last load of straw you have delivered to me till you deliver the next; I will hold one load in hand so as to have a check on you." It was held in that case, that the refusal to pay for the straw upon delivery as agreed, and the announcement, by the party to whom delivery was being made, that he would pay for no more loads upon delivery, which were for future delivery, was an abandonment of the contract. In the case of Mersey Steel & Iron Company v. Naylor, 9 H. L. 442, Lord Blackburn, said: "I have no doubt that Withers v. Reynolds lays down the law to this extent, that where there is a contract which is to be performed in the future, if one of the parties said in effect to the other, if you go on and perform your part of the contract I will not perform mine (in Withers v. Reynolds, it was, you may bring your straw, but I will not pay upon delivery as under the contract I ought to do. I will keep one load of straw in hand so as to have a check upon you), that amounts to saying, I will not perform the contract, I will not wait till you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." In the case of Franklin v. Miller, 4 A. & E. 599, Coleridge, J., in commenting on Withers v. Reynolds, said: "Each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the loads of straw upon delivery that was a total failure, and the defendant was no longer bound to deliver. In such a case the party refusing has abandoned the contract."

In Selby v. Hutchinson, 4 Gilman (Ill.), 399, the court said: "In order to justify an abandonment of the contract and of the proper remedy growing out of it, the failure of the opposite party must be a *total one*. The object of the contract must have been defeated or rendered unattainable by his misconduct or default." While this case does not relate to anticipatory breach, it will be seen that, the language is consistent with that of all the cases cited above. It takes a different viewpoint and comes to the same conclusion. There is no middle ground. Before the right to rescind takes place, the act complained of, must amount to a *total failure* and that means that some essential element of the contract has been violated; there must have been some act which would amount to a rescission had one party the power to rescind; but since there is no question but that rescission takes place only when both parties consent to it, one party cannot by his own act put an end to or rescind a contract. The result of all these cases is that there must be a total failure or an abandonment of the contract before rescission may be had. That means that the party injured may elect either to rescind or hold to the contract and sue as for a total failure of it.

A mistaken idea has grown up in the minds of many lawyers and has found expression in the opinions of some courts that there are breaches of a contract which would permit a party injured to rescind but that such act would not permit a suit as for a total failure (Palm v. Railway Co., 18 Ill. 217), but this opinion has grown out of the fact that in many cases there has been only the right to rescind exercised. It was said by Lord Blackburn in Withers v. Reynolds, *supra:* "In that case the other party may say, 'you have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but I will treat you as having put an end to the contract' [so far as you are concerned], and if necessary [if I wish to hold to the contract,] I will sue you for damages." Had he completed his meaning Lord Blackburn would have added: "as for a total breach, or abandonment of

the contract." It is to be obseved that in the case of Withers v. Reynolds, the contract had been performed in part when the breach occurred which went to the remainder of the performance and about which Lord Coleridge remarked, *supra:* "Each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the loads of straw upon delivery that it was a total failure. * * * In such a case the party refusing has abandoned the contract." In the case of the Lake Shore & Michigan Southern Ry. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, the instructions did not carry the law to the limit of Withers v. Reynolds, though they well might have done so. In that case there was a partial performance of a ten-year contract, and it was there deemed "necessary" to sue for damages. It is clearly to be understood from the able opinion therein by Mr. Justice Shope, that the law is correctly laid down in Withers v. Reynolds and kindred English cases. Two more very instructive cases in this connection are Richmond & J. v. The D. & S. C. Ry. Co., 40 Iowa, 269, and Masterton v. Mayor, etc., 7 Hill (N.Y.), 61. These cases relate to the measure of damages wherein the doctrine of *omnia contra spoiliatorem praesumuntur* was applied without saying so in so many words (see CENTRAL LAW JOURNAL, Vol. 61, p. 441) and were cases of total failure or abandonment of contract and acactions where the contracts were kept alive for the purposes of those actions. As to cases of commercial contracts where the description of the subject matter and time of performance were considered, see Norrington v. Wright, 115 U. S. 189, where there is a review of cases of this class.

There is a featare in the recent decisions above referred to which has not been brought out in any work on contracts yet produced. In case a party having a right to accept the breach of a contract by the other party, as putting an end to the contract, so far as the other party is concerned, and declaring a rescission thereof because of the breach, it is well settled that the *status quo* must be restored. That means, in view of the fact that by electing to rescind the contract, if the right exists, the party rescinding puts the contract out of existence. Each party then has a right to the restoration of the *status quo*, and if necessary may proceed by an action at law to enforce the restoration. As a condition precedent to the right to bring an action at common law, the plaintiff must restore or offer to restore the *status* of the other party, all which is well settled and cannot be disputed. But suppose a party having a right to rescind should deem it best to ask a court of equity to do the rescinding, is it then necessary as a condition precedent to the right to bring a suit in equity, to restore or show an offer to restore the *status quo?* Upon this proposition there has been considerable difficulty experienced in some courts. There is no end of cases where fraud has entered into either the making of or performance of a contract, where courts of equity have proceeded to rescind the contract. In cases of fraud there is a total failure of consideration, and it is on this ground the right to a proceeding in equity for a rescission is based. But we have shown that before a party has a right to rescind a contract the act of the other party must have amounted to a total failure.

The rescission of a contract is one of the grounds upon which equity takes jurisdiction. A proceeding for a divorce is nothing more than a proceeding in equity for the rescission of a contract. There are cases where a party may not have the means to restore the other party, but at the same time, if the rights of the parties were adjusted, the other party would be his debtor. Such conditions arise in cases where the promises of one of the parties to a compromise of a legal right have failed, and yet the injured party has received something from the other party toward the fulfillment of his part; before the contract may be rescinded this "something" must be restored. By proceeding in equity to have the rescission made, the court having jurisdiction of the parties and subject-matter may make an equitable adjustment of all the difficulties arising out of and connected with the subject matter, and it is not necessary in equity as a condition precedent to the right to bring the action that the *status quo* be restored. This will be found in 60 Cent. L. J. 384, in a leading article entitled "The Difference Between an Action for a Rescission and One upon a Rescission." In this connection we would call attention to the cases of Graver v. Scott, 80 Pa. St. 88; Farmers' Loan &

Trust Co. v. Galesburg, 133 U. S. 156, 10 Sup. Ct. Rep. 316; City Grand Haven v. Water Works Co. (Mich.), 57 N. W. Rep. 1075; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. Rep. 218; Cleveland Refining Co. v. Dunning, 115 Mich. 238, 73 N. W. Rep. 239; Ware v. Allen, 128 U. S. 590.

NOTES OF IMPORTANT DECISIONS.

PHYSICIANS AND SURGEONS — ILLEGAL CONTRACT FOR MEDICAL SERVICES.—Deaton v. Lawson, 82 Pac. Rep. 879, presents facts of possibly quite as much interest to the medical as to the legal profession. Plaintiff entered into negotiations with the manager of an establishment known as the "State Medical Institute," and the manager agreed to cure him within three months, for the sum of $85. When the plaintiff came to pay the $85, he exhibited a considerable amount in addition thereto, on sight of which the manager immediately represented that he could give plaintiff a different treatment which would effect a permanent cure in six weeks, but would cost more. These representations resulted in a contract by which plaintiff turned over $469 in cash, and a contract was made for the rendition of medical services, which contract declared that it was made by and between the officers of the institute and the physician in charge, as party of the first part, and plaintiff, as party of the second part. The contract was signed with the name of the medical institute, written by its manager and owner, who was not a physician; the only physician connected with the institute being one who was employed by the month. In an action to recover this money it was held that the contract was against public policy and void as an agreement on the part of the manager of the institute to render professional services as a physician, in violation of the laws of the state, and that the contract could not be construed as a contract made on behalf of the physician employed by the manager.

The Supreme Court of Washington, in deciding this case, said: "Stripped of all subterfuges and pretenses, this is neither more or less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void. A contract to render professional services is personal and nonassignable. Inasmuch as the appellant Lawson could not perform his part of the agreement without violating the laws of the state, there was no consideration for the alleged contract or the payment of the money thereunder, and the respondent is entitled to recover the money so paid, so long as the contract remains executory."

ARE NOTES OR OTHER UNEXECUTED OBLIGATIONS GIVEN TO A RAILROAD COMPANY TO INDUCE THE LOCATION OF STATIONS AT A GIVEN POINT VOID AS AGAINST PUBLIC POLICY.

Like a magnificent vessel looming up out of the ocean mists and fogs and entering the harbor of the world's commerce after a long and successful voyage, so Oklahoma and the Indian Territories now appear on the political horizon demanding admission into the union as one state, that of Oklahoma. During the year 1904, more miles of railway were built in the former than in any state or territory in the union, and over six thousand miles of road are now in operation in the two territories. During the year 1905 twenty new roads were chartered with a capital stock of over $117,000,000.00 and one-third of the railway mileage of the United States built within the last six years was within these two territories. The topographical and climatic conditions and agricultural and mineral resources of the country have been largely the causes of building roads with such amazing rapidity and to develop such substantial wealth and greatness during the unparalleled period of a decade.

The frenzied and modern method of building railroads in these territorities necessitated three organizations: First, the railroad company; second, the construction company; third, the Tonsite company, with the relationship of the personnel closely interwoven, and in many instances identical, the Townsite company acting as the advance agent securing the right of way and looting the public of as much money as possible in creating a rivalry between two or more different points along the proposed route, by assuming a hesitating, undecided, wavering attitude relative to the location of stations and depots, thus encouraging competitive bidding between rival points all along the line, and selling upon the auction block to the highest bidder the sovereign power conveyed to the railroad company by its charter from the people, granted by them in good faith for the promotion of the general welfare.

Out of this unparalleled development has necessarily grown a litigation of subjects as

numerous and varied, as will be found in the history of the jurisprudence of a half century in many of the older states. And while the lash of public opinion is compelling the senate of the United States to consider such legislation as will secure a fair and reasonable rate to all shippers alike and prevent all rebates, the Supreme Court of Oklahoma, in the recent case of the Enid Right-of-Way & Townsite Co. v. Lyle,[1] has performed a valuable and lasting service to the new state, and contributed its portion to the solution of one phase of the problem by removing the technical debris that has been heaped upon the law by courts controlled by railroad interests, and handed down an opinion which goes back to first principles, and fearlessly states the law of the case. The question involved the nature and character of the relationship existing between the officers of a railroad company and the general public, a most important phase of the railway question which is not receiving that degree of consideration and attention which its importance deserves. The court held that the case fell within the principle laid down in Fuller v. Dame,[2] by Chief Justice Shaw, and cited authorities supporting that doctrine; yet the application will be refreshing at this time to those who have not specially investigated the subject. The amount directly involved in the action was but $75.00, yet it is reliably estimated that there are notes of the same character in these territories amounting to over $500,000.00, which under the decision will be held void as against public policy, unless reversed by the Supreme Court of the United States in some future case, a petition, in this, for a rehearing having been denied.

The action was brought to recover judgment upon a note given by W. L. Lyle, the defendant, to the Enid Right-of-Way & Townsite Co., plaintiff, the consideration of which was the location of the railway station and depot, at a point designated on the line of the Denver, Enid & Gulf Railroad in Garfield County, Oklahoma Territory. On appeal in the district court a demurrer to the plaintiff's bill of particulars was sustained and judgment rendered for the defendant from which the plaintiff prosecuted his appeal to the supreme court, which affirmed the decision of the lower court. The only part of the bill of particulars necessary for a clear statement of the question involved is the note given by the defendant, and marked, "Exhibit A," which reads as follows: "July 1st, 1902. In consideration of the location of a railway station and depot on either the north half of section 31, or the south half of section 30, or on both of said sections, in Otter Township, in Garfield County, Oklahoma, on the line of the Denver, Enid & Gulf Railway Co., I agree and promise to the said Enid Right-of-Way & Townsite Co., seventy-five dollars ($75.00), to be due and payable when the said road is completed to the point where said location may be made.—W. L. Lyle." In its opinion, the court said: "Now, the sole question for consideration by this court is, is this note in contravention of public policy, and is it one which the court, with due regard for the rights of the public, and sound policy, should enforce?" The court held: First, "that the railroad company is a *quasi*-public corporation, and the public have an interest in the location of their stations and depots. An agreement which tends to influence or lead persons charged with the performance of the duty of locating such railroad stations or depots, is an agreement to influence the discharge of a trust to the public, intended by law for the benefit of the people; and any agreement which tends to influence, restrict or limit that power for a pecuniary consideration running to that company, or its agents, or persons supposed to have an influence with such company will be void as against public policy, and not enforceable by the courts. Second, public policy requires that a railroad company chartered by the authority of the territory, should not be permitted to limit these franchises by contract, which will place it in a position where it is not free to act in the location of its railroad stations and depots at such points as public convenience may require; and a contract that provides that for a consideration the location of a railroad station or depot by the railroad corporation shall be at a certain point without regard to the question of the needs of the people, or the public convenience, is against public policy."[3]

[1] 82 Pac. Rep. 810.
[2] 18 Pick. 472.
[3] Citing People v. Chicago Coal Valley Mining Co., 68 Ill. 489; Thomas v. West Jersey R. R. Co., 101 U. S. 83, 25 L. Ed. 950; Fuller v. Dame, 14 Pick. 474.

Observation discloses instances where arguments, supplemented by free transportation, have created fanciful and unwarranted distinctions in the classification of cases. Agreements containing restrictive limitations by which the railroad company undertakes to prohibit itself from thereafter erecting other station houses or depots at other places, or within prescribed limits, are uniformly held void, as against public policy.[4] Another class of cases are those in which some officer or other person supposed to be influential with the railway company undertakes, for a consideration moving to them, to secure the location of stations and depots, etc., at a particular place—a conspicuous case in this class is Fuller v. Dame.[5] All such contracts are void as against public policy.[6] The remaining class of cases is where an agreement has been made between an individual and the railway corporation for the location of a station or depot at a particular place in consideration of a donation of money or property to the corporation without any restriction or prohibition against any other location, and strange to say, such agreements have been held valid by some authorities.[7]

Railroads are public highways with the proprietary ownership vested in the state. By charter, the corporation is authorized to build, maintain, operate and charge a reasonable toll for usage. As held in the celebrated Dartmouth College case: "When a corporation accepts from the public a charter, there is established between the public and the corporation accepting and acting under the charter, a contract." In the case of railroads, the incorporators bind themselves to build for the state a railroad to be used by the people as a public highway. In consideration thereof, the state consents to clothe the stockholders with a portion of her own sovereignty; to erect them into a body politic; to delegate to them her right of eminent domain, and grant them the franchise of taking reasonable tolls from all who should travel or carry on her highway; and before a railroad company can exercise the right of eminent domain it must aver and establish its public character and its public necessity. It follows then, that the railroad company is a public trustee, a part of the government, its officials acting as public agents who should be held to as strict an accountability for the free and impartial performance of their duties as any other official in public service.[8]

The directors of a railway corporation are public agents and under the law are required to locate and establish the stations and depots along its route at such places where the public interest will be best subserved, and this, in turn, safeguards the interests of the stockholders which they represent. The sound policy of the law is, that the two-fold relationship of the railway official shall not conflict; that the interests of the public and the interests of the stockholder are identical. In the location of stations and depots the directors of the road, or officials having charge of such matters must be left free to exercise an impartial and untrammelled judgment with an eye single to the public convenience, and they should not be permitted to accept either for themselves or for the corporation which they represent, payment for doing that which the law requires them to do. Hence, it follows, that donations made for and in consideration of the location of stations and depots at a designated point should be held void, as against public policy, because, first, they prevent the free and impartial exercise of discretionary power in the performance of a public trust by a public agent. Second, experience shows, they limit and restrict the corporation in the exercise of its power and bring into conflict the interests of the stockholders and the public convenience. Suppose X, *e. g.*, to be a county seat containing 10,000 inhabitants, and of the requisite dis-

[4] Louisville v. N. A. & C. Co., 106 Ind. 55; Williamson v. Chicago & R. I. R. R. Co., 53 Iowa, 126, 26 Am. Rep. 206, 4 N. W. Rep. 870; St. Paul & N. W. R. R. Co., 64; St. L. J. & C. R. Co. v. Mahers, 71 Ill. 592, 22 Am. Rep. 122; St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357.

[5] 18 Pick. 472.

[6] Bester v. Wathen, 60 Ill. 138; Lender v. Carpenter, 62 Ill. 309, and cases cited therein.

[7] 49 Iowa 403; 31 Am. Rep. 153; 9 Watts, 458; 36 Am. Dec. 132, 9 Kan. 373.

[8] Erie & N. E. R. R. Co. v. Casey, 26 Pa. St. 287. In the Pennsylvania case cited it was there determined, "that a railroad built by authority of the state for the general purposes of commerce is a public highway, and in no sense, private property; that a corporation authorized to run it is a servant of the state as much as an officer legally appointed to do any other public service; as strictly confined by the laws and as liable to be removed for transgressing them."

tance from the nearest station, with markets and facilities established, with trade centered; and that the public convenience would be best subserved by the location of a depot at that point; a corporation is building a road through that place. X offers no inducements or donations; a townsite company, owning a large tract of land a mile distant from X at Z, on the proposed route offers land for a townsite, and donations of money in consideration of the corporation locating and establishing its station and depot at that place, and complying with the agreement the corporation locates its station and depot at Z. Should it be permitted, in view of the reasoning supporting the two former class of cases, to compel the transfer of land or the collection of donations? We think not. The presumption should be that the company had located its station and depot where the law required, and in that event the law would not permit it to exact payment. Would a writ of *mandamus* issue on the application of X in the absence of legislative requirements? No. *Mandamus* will not interfere with discretionary power. The reasoning upon which the third classification of cases rest is not and cannot be harmonized with the other two, the sound doctrine of which precludes the latter.

M. C. GARBER.

Enid, Okla.

WILLS—BEQUEST TO CORPORATION.

SPEER v. COLBERT.

Supreme Court United States, January 2, 1906.

The institution incorporated as "The President and Directors of Georgetown College" by the act of congress of June 10, 1844 (6 Stat. at L. 912, ch. 41), which expressly provides that no misnomer of a corporation shall defeat or annul any donation, is entitled to the property bequeathed to "Georgetown University in the District of Columbia," where there is not, in such district, any such incorporated institution of learning as "Georgetown University," separate from and independent of "Georgetown College."

The death or resignation of the trustees named in a will, who are directed to pay and see to the application of a bequest to an educational institution, to be held and used as an endowment for the purposes of colonial research, does not cause the trust to fail, but the court may appoint their successors.

Uncertainty as to the amount cannot successfully be urged to defeat the bequest of a sum not exceeding $5,000, to be equally divided between two named charitable institutions, which the testator directs to be made in the event of the invalidity of a prior bequest of a sum not exceeding $5,000 for another purpose.

A bequest of a sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship in a medical college, is not void for any uncertainty as to the amount.

The discretion to be exercised by the trustees under a will in selecting the medical college in which a scholarship is to be maintained does not avoid the bequest, where the testator expressed his preference for Georgetown College, if the scholarship could be maintained in that institution, and if not, directed that it be a scholarship in some medical college in the District of Columbia.

Statement by Mr. Justice Peckham: One of the appellants, Mrs. Speer, on the 5th of March, 1901, filed this bill in her own behalf and by her husband and next friend, Emory Speer, in the supreme court of the District of Columbia, to obtain a judicial construction of the will of her deceased brother, Ethelbert Carroll Morgan, who died, testate, on May 5, 1891, a resident of the District of Columbia. Answers to the bill were duly filed and the supreme court gave judgment construing the will, which, upon appeal to the court of appeals of the District of Columbia, was reversed, and judgment was entered, construing the will, by the court of appeals. From that judgment Mrs. Speer, together with some of the parties defendant in the suit appealed, and brought the case here for review. The will in question was executed on the 22d day of April, 1891, and the testator died May 5, 1891. He was never married, and left as his next of kin and heirs at law two brothers and three sisters, viz.: James D. and Cecil Morgan and Mrs. Speer the plaintiff in this suit, and Mrs. Anna M. Mosher and Mrs. Ada M. Hill. He appointed William J. Stephenson and John H. Magruder the executors and trustees of his will, the former of whom subsequently died and the latter resigned, and Michael J. Colbert and James Mosher were duly appointed by the court as substituted trustees under the will. The estate of the testator was treated by him in his will as consisting of two parts,—that which he had himself accumulated, and that which came to him through the will of his father, who died in June, 1889. His own accumulations amounted to a little over $23,000, while the estate which he received from his father somewhat exceeded $55,000, the total being a trifle over $78,000. The estate of the deceased had been received by the substituted trustees, Colbert and Mosher, when this bill was filed by Mrs. Speer against them, and also against Mrs. Anna M. Mosher, the wife of James Mosher, and a sister of the testator, and also against the two corporations incorporated as St. Vincent's Orphan Asylum and as Trustees of St. Joseph's Male Orphan Asylum, both being in the District of Columbia, who were made parties because, as the plaintiff alleges in her bill, they claim to be the beneficiaries under the clause of the will of the testator, leaving a legacy to be equally

divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums in the city of Washington, and in order that they might make proof of their identity, if any existed with the St. Vincent, and also with the St. Joseph, Catholic Orphan Asylums, mentioned in the will, and that they might be bound by the adjudication which might be made by the court in all respects hereafter; and also against John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt, who the plaintiff alleged, claimed to be, by succession, the president and directors of Georgetown College, and who, as such, claimed an interest in the estate of the testator, under the clauses of his will mentioning Georgetown University, in the District of Columbia, and the plaintiff alleged that they were made defendants in order that they might make proof of succession to the original incorporators of Georgetown College, and that their claims to the legacy mentioned in the will might be adjudicated by the court. The bill alleged that the will of the testator was duly admitted to probate in the proper court in the District of Columbia. After making certain provisions, not here material, the will of the testator is as follows: "All the rest and residue of my estate real, personal and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will of which I would become possessed at my mother's death) I give, bequeath and devise to my trustees hereinafter named and their heirs and assigns with full power to sell, convey, mortgage and reinvest, in trust nevertheless to apply the income and profits to the use and benefit of my sisters Eleanora Speer wife of Emory Speer and Minnie Mosher wife of James Mosher in equal parts during their lives and at their death to deliver and convey each sister's share to her issue and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her.

"And if my said two sisters shall both die leaving no issue living at their deaths I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof.

* * * * * *

"And I hereby give, bequeath and devise any and all the estate real personal and mixed devised to me under my father's will and to which I become entitled to have and possess upon my mother's death to my trustees hereinafter named their heirs and assigns forever with full power to sell convey, mortgage, encumber and reinvest in trust nevertheless to pay and see to the application of

"First the sum of ten thousand (10,000) dollars to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

"Second a sum not to exceed five thousand (5,000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells and either a side altar or memorial window or a bell and either a side altar or memorial window for some one Catholic church * * * said church to be in the District and to—designated by my mother by her last will or otherwise and if she fail so to do I direct my trustees to carry out this trust as a memorial of my mother Nora Morgan and donate the same to some Catholic church * * * giving a preference, if there be one, built by the Jesuits. And in event this clause & gift be void I direct said sum not exceeding $5,000 five thousand dollars shall be equally divided between St. Vincent's and St. Joseph's Catholic orphan asyulms in the city of Washington.

"Third. A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

"Fourth, the sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as I may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide to the scientific department, or the foundation and the application of the income to a scholarship in the classical department, in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

"And lastly as to all the rest and residue of my aforesaid share of my father's estate my said trustees their heirs and assigns shall hold the same for the benefit of my aforesaid sisters Ellenora and Minnie upon the same limitations conditions remainders and powers and in the same manner as the trustees under my father's will, will then hold retain and possess the 'remainder' and bulk of the respective shares of my said two sisters I wish my brother Cecil to have my share of my father's library I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament.

"In witness whereof I have signed and sealed and published and declared this as my will this 22nd day of April, 1891."

The plaintiff alleged that the bequest and devise to Georgetown University, upon the death of two sisters, without issue living at the time of their death, were void, because, as alleged, there was no such incorporated institution in the District of Columbia as Georgetown University, capable of taking the bequest and devise, and also upon the ground that, assuming there was a simple misnomer, and that Georgetown College was meant instead of Georgetown University, yet, even upon that assumption, Georgetown College was incapable of taking the devise and bequest, because it was under the supervision and control of the Order of Jesuits, and that the college was therefore a sectarian institution. It was also averred that the bequest of $10,000 to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, "was void, upon the same ground, and also because there was no charter power or authority in Georgetown College (assuming that institution to be meant) to receive the bequest." Also that the bequest of the sum not to exceed the amount of $5,000, to be applied and expended under the personal supervision of the trustees, for the purchase and erection of a chime of bells, etc., was void as was also the alternative bequest of an amount not to exceed that sum for the benefit of the two Catholic orphan asylums in the city of Washington, the alternative bequest being void on the ground that those asylums were under the charge and control of persons belonging to religious orders, and therefore incapable of taking the bequest, and on the further ground that the amount of the bequest was uncertain. The bill averred also that the remaining bequest of a sum not to exceed $3,000, and also the bequest of $5,000. for the purpose of maintaining and founding scholarships, etc., were void, because of their uncertainty and the want of clearly defined conditions under which the funds should be applied. The defendants answered the bill and none of them conceded the validity of the claims made therein. Colbert, one of the substituted trustees, and also John D. Whitney and others, for and on behalf of the president and directors of Georgetown College, and also the trustees of St. Joseph's Male Orphan Asylum and of St. Vincent's Orphan Asylum, all claimed the validity of the bequests contained in the will, while the answer of Mosher, the other substituted trustee, simply expressed his willingness that the provisions of the will of the testator should be given effect and carried out only so far as they were legal and valid. On the trial proof was taken in regard to the name and corporate status of Georgetown College, claiming the devises and bequests made to and on behalf of Georgetown University. The supreme court, in an elaborate opinion (reported in 31 Wash. L. Rep. 630, 646), held that the devises and bequests to trustees named in the will, of the testator's estate, exclusive of that which came to him under the will of his father, were valid and effectual. The court also held that all the clauses and subclauses in the will of the testator, disposing of property acquired by the testator under his father's will, were void, and that the property therein spoken of became part of the residuum of the estate of the testator, and vested in the beneficiaries entitled to take under the residuary clause of the will. The court of appeals, upon review of this judgment, held that the clauses of the will were valid, except the bequest of "a sum not to exceed five thousand dollars," to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, and the erection of an altar or memorial window, etc.; but the alternative bequest of the sum not to exceed $5,000, to be equally divided between St. Vincent and St. Joseph's orphan asylums, in the city of Washington, was good. It also held that the clause in the will, providing for the application of $5,000 to form a fund to be known as the E. Carroll Morgan fund or scholarship, to be applied as "I (the testator) may hereafter verbally indicate to my trustees, or if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia," was void. No appeal has been taken from this last portion of the judgment of the court of appeals.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The opinion of the court of appeals in this case, delivered by Chief Justice Alvey (24 App. D. C. 187), is entirely satisfactory to us, and leaves little to be said in addition. For the purpose, however, of simply stating the opinion of this court upon the various questions, without discussing them at length, we add what follows.

The appellants insist that the gift of the property to the Georgetown University is void, as having been made to a sectarian institution less than one calendar month prior to the testator's death, and that such disposition was therefore in violation of § 457 of the Revised Statutes of the District of Columbia. That section makes valid and effectual all sales, gifts, and devises prohibited by the 34th section of the Declaration of Rights of the state of Maryland, adopted in 1776, "provided, that in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." 14 St. at L. 232, ch. 237; passed July 25, 1866. The 34th section of the Maryland Bill of Rights makes void: "Every gift, sale, or devise of lands to any minister, public teacher, or preacher of the Gospel as such, or to any religious sect, order, or denomination, or to or for the support, use, or benefit of or in trust for any minister public teacher, or preacher of the Gospel as such,

or any religious sect, order or denomination; every gift or sale of goods or chattels to go in succession or take place after the death of the seller or donor, to or for such support, use, or bene- of any minister, public teacher, or preacher of the Gospel as such, or any religious sect, order, or denomination, without leave of the legislature."

It is also insisted that there is a misnomer of the corporation, now claiming the right to the bequest, inasmuch as such corporation was incorporated under the name of "The President and Directors of Georgetown College," while the bequest is to "Georgetown University, in the District of Columbia." It is contended that Georgetown College is a corporation, incorporated on the 10th of June, 1844, under an act of congress (6 Stat. at L. 912, ch. 41), entitled "An Act to Incorporate Georgetown College, in the District of Columbia." and that there was and is another institution in Georgetown, sometimes called the University of Georgetown, or Georgetown University, which was distinct from the college incorporated under the above-mentioned act of congress, and not covered by it, and that the testator knew of this so-called university, that he was a professor therein, and that such university was, at the time of the testator's death, a sectarian institution within the 34th section of the Maryland Bill of Rights above mentioned. The 4th section of the above act expressly provides that no misnomer of the corporation shall defeat or annul any donation, etc., to the corporation. We agree with the supreme court and the court of appeals of the District of Columbia in the opinion that there was not, at the time of the execution of his will by the testator, or at the time of his death, any incorporated institution existing as Georgetown University or University of Georgetown, separate or apart from, or having powers other than those granted to "The President and Directors of Georgetown College," by the act of congress of 1844, above cited. It appears in the evidence that this college was frequently spoken of as Georgetown University, and known as such, but the evidence entirely fails to show that there were two incorporated institutions, the one, "Georgetown University," and the other, "The President and Directors of Georgetown College." And we have no doubt that the testator meant the corporation called Georgetown College when he used in his will the word "university." He meant to give the property to a corporation, and to one that could take it, and the evidence shows there was no other corporation of that kind. Upon this question the court of appeals said: "It is expressly alleged in the bill as a fact that there is no such incorporated institution as Georgetown University, though Georgetown College is frequently referred to and spoken of as Georgetown University, notwithstanding it has never been incorporated as such. It is simply a popular designation applied to the college. It is alleged in the bill that the defendants Whitney and others, under the name of The President and Directors of Georgetown College, in this district, claim to be the beneficiaries entitled to the legacies mentioned in the will of the testator as for Georgetown University. It is not attempted to be shown that there was, or is, in existence, in this district, any such incorporated institution of learning as 'Georgetown University,' separate from and independent of Georgetown College." It was not to any unincorporated so-called institution that the testator intended to leave the property, but to one that was incorporated and capable of taking a legacy.

Various acts of the legislature of Maryland were referred to on the argument, particularly the act of 1792, ch. 55; that of 1797, ch. 40; the act of 1805, ch. 118; that 1808, ch. 37; also the Act of congress of March 1, 1815, ch. 70 (6 Stat. at L. 152), entitled "An Act Concerning the College of Georgetown in the District of Columbia;" also that of March 2, 1833 (6 Stat. at L. 538, ch. 86), in which the government grants certain lots in Washington city to the college above referred to. These various statutes were cited for the purpose of showing the validity of the claim that an institution called Georgetown university, as distinct from Georgetown college, was meant in the will of the testator. In regard to these particular acts we think they do not bear upon the case other than, as remarked by the court of appeals, to show the origin and growth of Georgetown college, and to identify the early foundation of the school with the president and directors of Georgetown college, as that institution was fully and completely incorporated by the above-cited act of congress of June 10, 1844. That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. Bradfield v. Roberts, 175 U. S. 291, 44 L. Ed. 168, 20 Sup. Ct. Rep. 121.

Taking the character of the college from the act of congress, we are of opinion that it is not a sectarian institution or within § 34 of the Maryland Bill of Rights. The reasoning upon this subject (as well as that upon the alleged misnomer of the college) set forth in the opinion of the supreme court (31 Wash. L. Rep. 630) and in that of the court of appeals is entirely satisfactory, and we concur therein.

There is, in our judgment, no merit in the contention that the persons claiming as president and directors of the college are not the legal successors of the original incorporation. There is no evidence that the same has been dissolved. The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved, by the mere failure to elect trustees. We do not think that in this case there was any failure to elect, nor was there any dissolution.

We now come to the consideration of the validity of the disposition made of the testator's prop-

erty which came to him from the will of his father. The testator gives and bequeaths all of that property to his trustees, thereafter named, in the will, and their heirs and assigns forever, "with full power to sell, convey, mortgage, encumber, and reinvest, in trust nevertheless to pay and see to the application of: First, the sum of ($10,000) ten thousand dollars to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund."

Aside from the objections to the bequest to Georgetown University already considered, a further objection is made, and the disposition is alleged to be void, because there is no charter power in any institution which could take under this bequest that authorizes it to prosecute such research, and obtain and preserve the archives relating thereto. It is well said, in the opinion of the court of appeals in this case, that the act of incorporation of Georgetown College, in 1844, confers "corporate power upon the institution for the instruction of youth in the liberal arts and sciences, and also clothes the corporation with power to take any estate whatsoever, in any lands, etc., or goods, chattels, moneys, and other effects, by gift, bequest, devise, etc., and the same to grant convey or assign, and to place out on interest for the use of said college, and to apply the same [thereto]. The cultivation of historical research would seem to be a part of a liberal education, such as should be encouraged by a college intended to confer degrees upon students in acquiring a liberal education in the arts and sciences." In Jones v. Habersham, 107 U. S. 189, 27 L. Ed. 407, 2 Sup. Ct. Rep. 336, it is said that "a corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum."

Although it is, under the will, the duty of the trustees therein named to exercise supervision over the administration of the fund, nevertheless, the death or resignation of the trustees named in the will cannot, and does not, defeat the bequest. There is not such a personal trust as renders it necessary to have the personal action of the trustee named in the will, and the trust does not fail upon the death or resignation of the named trustee. The court may appoint his successor. Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

Both courts below have held the bequest of a sum not to exceed $5,000, to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, etc., to be void. We agree with those courts in that respect. We also agree with the views of the court of appeals, holding that the alternative bequest of this same sum, not to exceed $5,000, to be equally divided between the two orphan asylums, is valid. There is no material misnomer in either case, although they are incorporated institutions, one by the name of St. Vincent's Orphan Asylum and the other as St. Joseph's Male Orphan Asylum in the city of Washington, and they are referred to in the will as as St. Vincent's Orpban Asylum and St. Joseph's Catholic Orphan Asylum.

Nor does the bequest violate the 34th section of the Maryland Bill of Rights, already referred to. The same reasoning on that point governs this bequest as is applicable to the bequest to the University of Georgetown. Neither of these orphan asylums is a sectarian institution under the acts of incorporation. The other objection made is that the clause directs that a sum, not exceeding $5,000, shall be equally divided between these orphan asylums; and it is said that there is such uncertainty in the amount of the bequest as to render it impossible to execute it, that it might be fulfilled by dividing a dollar between the asylums, or any other sum within the $5,000 named in the bequest. But it seems to us that the intention of the testator is clear to give the full sum of, but not to exceed, $5,000. That is, he gives $5,000 to be equally divided between these two asylums. While the amount is not to exceed $5,000, the direction for an equal division, taken in connection with the other facts, renders it, in our opinion, clear that the intention of the testator was that that sum should be the amount of the bequest. Courts are always reluctant to hold a bequest void for uncertainty, and they only do it when actually compelled to do so by the language used. Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617. If the testator had really intended that any less sum than $5,000 should be disposed of by and equally divided under this clause in his will, he would have said so.

Objection is also made to the bequest of "a sufficient sum, not to exceed three thousand (3,000) dollars, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the district, to be known as the E. Carroll Morgan scholarship." The first objection, as to the uncertainty of the amount of the bequest, we do not regard as meritorious. It is a sum sufficient to found a scholarship, and it shall not exceed, in any event, $3,000. If one can be founded, within the conditions named in the will, for a less sum than $3,000, then that less sum only can be used. The discretion to be exercised by the trustee in selecting the college with which to connect the scholarship does not render the bequest void. The testator has, by this clause in his will, himself expressed his preference for Georgetown College, if the scholarship can be maintained in that institution, but if not, it is to be a scholarship in some medica

college of the district. This, we think, is not an improper or uncertain disposition of the bequest, or an illegal placing of a discretion in the trustee under the will. See Attorney-General v. Glee, 1 Atk. 356; Attorney-General v. Fletcher, 5 L. J. Ch. N. S. 75, 2 Perry, Trusts, 4th Ed. § 721.

The last bequest objected to is that of $5,000, to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied as the testator might thereafter indicate to his trustees, etc. This has been declared void by both courts, and no appeal has been taken from the judgment of the court of appeals, adjudging that item to be void. That bequest being adjudicated invalid, the fund provided for therein forms part of the residue of the testator's estate, and passes under the residuary clause of the will.

These views call for an affirmance of the judgment of the court of appeals, with costs to the several parties, to be paid out of the residuary fund, as provided for by the judgment of that court.

Affirmed.

NOTE.—The frequency with which devises are made to educational and religious institutions makes the principal case one of importance to the profession and it will be interesting to note some of the opinions of other courts. In Minat v. The Boston Asylum, 18 Mass. 446, a testator gave a legacy to the "Boys' Asylum and Farm School." There was no institution or association of any similar name, except a body incorporated by the name of the Boston Asylum and Farm School of Indigent Boys. The court held that this corporation was entitled to the fund.

In the case of Stratton v. Physio-Medical Institute 149 Mass. 505, a testamentary gift to the trustees of the Psyo-Medical College of Cincinnati Ohio to be used by the college for promotion of the medical art as favored and believed in by the testator and in support of that institution, will not be decreed to the Psyo-Medical Institute, where the testator supposed there was a school of the name used by him, of which his friend at whose instance the gift was made, was the president or director, but which in fact had ceased to exist. In New Hampshire it was held, where a bequest was made to the Franklin Seminary of Literature and Science, New Market, N. H., there was no school of that name but there was an institution incorporated by the name of the Trustees of the South Newmarket Methodist Seminary, and there was no other public school in Newmarket. The court held that as the bequest was to a seminary at Newmarket, the trustees were entitled to the legacy. In New York a devise to the trustees of an incorporated college and their successors forever, in trust, vests the estate in the college as a corporation.

In Pennsylvania in the Appeal of Newell, 24 Pa. 197, it was held that the trustees of the Theological Seminary of the Presbyterian church may take under a devise to the "trustees or those who hold the funds of the Theological Seminary at Princeton, N. J.," where it appeared that such corporation was generally known as the Theological Seminary at Princeton. *In re* Pepper's Estate, 154 Pa. 331, it was held that a bequest to the trustees of such a free library as may be established within certain limits, contemplates the creation of a new library in the future and is not a bequest to an existing library. In Wisconsin n the case of Dodge v. Williams, 46 Wis. 70, it was held. that "a charitable bequest to an institution of learning of a character and organization commonly called and known as a 'female seminary' to be 'or-t ganized' by the end of five years, contemplates tha the institution is to be incorporated."

In Connecticut, in Jacobs v. Bradley, Conn. 36 365, "a legacy to the Episcopal society in Hamden should be construed as a gift to Grace church, that being the only Episcopal society in Hamden." In Iowa it was held in Johnson v. Mayne, 4 Iowa, 180, "when a bequest of money is made to a church without designating the particular officer to whom payment of the legacy shall be made, the money may be paid to one who ordinarily receives and keeps the funds of the church or to its treasurer for the time being." See also 4 Cent. Dig., Secs. 1111 and 1112.

BOOKS RECEIVED.

The Rule Against Perpetuities. By John Chipman Gray, Royal Professor of Law in Harvard University. Second Edition. Boston: Little, Brown & Co., 1906. Buckram, pp. 721. Price $6.00. Review will follow.

HUMOR OF THE LAW.

NOVEL WAY OF PREVENTING LITIGATION.

A nervous old lady was riding down a dangerous looking trail with a California stage-driver, when she noticed a hatchet lying in the bottom of the stage, and inquired why he carried it. "I use that hatchet to knock injured passengers on the head," replied the driver. The old lady gasped with astonishment. "We have a good many accidents on this 'ere line," he continued; "the stage's allus tippin' over and rollin' down precipices, and every time a passenger gits hurt he sues the company for damages. These here damage suits uses up all the profit of stagin,' and we've had to stop 'em, so every driver carries a hatchet. When a passenger gits hurt we simply knock him on the head and throw the body over a precipice, and then there ain't no lawsuit. See?"

The following example of cross-questioning, I have been told, occurred in this town about twenty years ago:

"Mr. Tucker, will you have the goodness to answer directly and categorically a few plain questions?"

"Certainly, sir."

"Well, Mr. Tucker, is there a female living with you who is known in the neighborhood as Mrs. Tucker?"

"There is."

"Is she under your protection?"

"Yes."

"Do you support her?"

"I do."

"Have you ever been married to her?"

"I have not." (Here several of the jurors scowled on Mr. Tucker.)

"That is all, Mr. Tucker."

"Stop one moment, Mr. Tucker," said the opposing counsel; "is the female in question your mother?"

"She is."

Another sample of the impertinence dispensed from the New York bench by Magistrate Pool whose removal is petitioned for, is furnished by his indignation at a police officer who testified that in his behalf a boy complained of for a minor offense was insane.

"You mean he is *non compos mentis*," shrieked the magistrate.

"I don't believe I understand," said the policeman.

"What! You don't know what *non compos mentis* means? How long have you been on the police force?"

"Twenty-five years," replied the officer.

"A detective twenty-five years and don't know what *non compos mentis* means?"

"Yes; if I understood that language I would not be a policeman," was the pat retort.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL — Action for Hindering Plaintiff's Business.—Action for hindering and interfering with plaintiff's business held not to survive death of defendant, either at common law or under Hurd's Rev. St. 1903, ch. 3, § 122.—Jones v. Barmm, Ill., 75 N. E. Rep. 505.

2. ABATEMENT AND REVIVAL — Defective Service. — That the servant, on whom in an action against master and servant, summons for the master was served, was employed merely as a laborer, held no ground for abatement, but merely for quashing the service. — Indiana Nitro-glycerine & Torpedo Co. v. Lippencott Glass Co. Ind., 75 N. E. Rep. 649.

3. ACCIDENT—Death by Inhaling Gas. — Accident insurance policy construed, and held not to exempt company from liability for death caused by inhaling gas accidentally escaping.—Travelers' Ins. Co. v. Ayers, Ill., 75 N. E. Rep. 506.

4. ACCOUNT, ACTION ON—Variance Between Verification and Account.—In an action on account made out against a third person, the variance between the account and the affidavit, charging defendant with liability thereon, held immaterial.—Pelican Lumber Co. v. Johnson Mercantile Co., Tex., 89 S. W. Rep. 439.

5. ACCOUNT, ACTION ON—State of Demand.—A state of demand on a book account in the court for the trial of small causes must show the nature of the demand and the parties.—Weill v. Jacoby, N. J., 61 Atl. Rep. 889.

6. ADJOINING LANDOWNERS—Negligent Excavation.—In an action by the lessee of a building for injuries caused by the fall thereof, alleged to be the result of negligent excavation by defendant, an adjoining landowner, held error to direct a verdict for defendant.—Di Palma v. Weinman, N. M., 82 Pac. Rep. 360.

7. ADULTERY — Complaint by Divorced Husband.—Under Code, § 4982, a divorced husband does not occupy such a status as to entitle him to complain against his wife for adultery committed by her prior to the divorce. —State v. Loftus, Iowa, 104 N. W. Rep. 906.

8. APPEAL AND ERROR—Abstract of Record.—Failure of plaintiff in error to include in the abstract a copy of the decree and special findings, as required by rule 14 (80 Pac. viii), held ground for dismissal.—Hurd v. Fleck, Colo., 82 Pac. Rep. 485.

9. APPEAL AND ERROR—Bill of Exceptions. — An exception to the final judgment is necessary, in a suit tried by the court, to present the questions whether the evidence supports the judgment.—Grand Pacific Hotel Co. v. Pinkerton, Ill., 75 N. E. Rep. 427.

10. APPEAL AND ERROR—Constitutional Questions.—A constitutional question will not be reviewed, unless raised in the court below, and the ruling thereon assigned for error.—Masonic Fraternity Temple Ass'n v. City of Chicago, Ill., 75 N. E. Rep. 489.

11. APPEAL AND ERROR— Costs on Dismissal of Appeal. —Appellant from an interlocutory judgment from which no appeal will lie will be required to pay all costs occasioned by such appeal.—Chicago Portrait Co. v. Chicago Crayon Co., Ill., 75 N. E. Rep. 473.

12. APPEAL AND ERROR — Continuance on Ground of Absent Witness.—Refusal to grant a continuance for the absence of a witness is not prejudicial, where the other party admits the facts to which the absent witness would have testified.—Kellyville Coal Co. v. Strine, Ill., 75 N. E. Rep. 375.

13. APPEAL AND ERROR — Finding of Chancellor.—A chancellor's finding of fact in an equity suit will not be reviewed on appeal where appellant has failed to incorporate all the evidence in the record. — McKinney v. Northcutt, Mo., 89 S. W. Rep. 351.

14. APPEAL AND ERROR — Instructions. — A charge which submits a part only of defenses urged by a defendant is not ground for reversal unless the court refuses to give an instruction supplying omission.—Metropolitan St. Ry. Co. v. Wishert, Tex., 89 S. W. Rep. 460.

15. APPEAL AND ERROR—Instructions as to Defective Appliances.—In an action for injuries to a servant, a charge making it the absolute duty of the master to furnish reasonably safe appliances held not prejudicial to defendant.—Odin Coal Co. v. Tadlock, Ill., 75 N. E. Rep. 332.

16. APPEAL AND ERROR—Joinder of Parties in Mandamus Proceedings.—The joining of a person in *mandamus* proceedings who has not the power to perform the duties demanded does not vitiate the proceedings or prevent the issuance of the writ.—State v. Pan-American Co., Del., 61 Atl. Rep. 398.

17. APPEAL AND ERROR—Justice of Peace Record.—Where an appeal from a justice's judgment was tried by the court, the admission of a transcript of the justice's record in evidence was not prejudicial error.—Keylon v. Missouri, K. & T. Ry. Co., Mo., 89 S. W. Rep. 337.

18. APPEAL AND ERROR—Parties.—The appellate court cannot take jurisdiction in a vacation appeal where all

the parties to the judgment are not before it as parties in the assignment of error.—Kemp v. Prather, Ind., 75 N. E. Rep. 673.

19. APPEAL AND ERROR—Separable Judgment.—That part of a judgment awarding damages in addition to the partial release of a judgment lien held separable, so that error in awarding such damages did not affect the validity of the judgment.—Byrne v. Kelsey, Conn., 61 Atl. Rep. 965.

20. APPEAL AND ERROR—Weight of Evidence.—Where there is any evidence to sustain the verdict, the supreme court will not consider whether the answer to a special interrogatory, which was in accord with the general verdict, was against the weight of evidence.—Leighton & Howard Steel Co. v. Snell, Ill., 75 N. E. Rep. 462.

21. ATTORNEY AND CLIENT—Right to Fees.—An attorney in partition proceedings, who purposely omits lienholders from the bill, is not entitled to attorney's fees.—Mansfield v. Wallace, Ill., 75 N. E. Rep. 682.

22. AUCTIONS AND AUCTIONEERS—Liability on Auctioneer's Bond.—Laws 1897, p. 776, ch. 682, § 5, does not impose liability on auctioneer's sureties in favor of a mortgagee for the act of an auctioneer in personally buying property subject to mortgage and thereafter selling the same and keeping the proceeds.—Moser v. Bankers' Surety Co., 95 N. Y. Supp. 609.

23. BANKS AND BANKING—Limitation of Actions.—A state statute of limitations does not begin to run against the right to enforce liability of stockholders in national bank, until amount thereof had been ascertained by comptroller of currency.—Rankin v. Barton, U. S. S. C., 26 Sup. Ct. Rep. 29.

24. BANKS AND BANKING—Shareholder's Right to Inspect Books.—Common-law right of stockholder to inspect books of corporation is not restricted as to national banks, by Rev. St. U. S. §§ 5211, 5240, 5241.—Guthrie v. Harkness, U. S. S. C., 26 Sup. Ct. Rep. 4.

25. BILLS AND NOTES—Innocent Purchaser.—Purchaser of note having at first acted on information that there was something wrong with it, could not claim that he was an innocent purchaser.—Vette v. Sacher, Mo., 89 S. W. Rep. 860.

26. BILLS AND NOTES—Surrender of Collateral.—Defendant held not liable to the transferee on a note which had been satisfied by the surrender of collateral.—Carrington v. Turner, Md., 61 Atl. Rep. 824.

27. BRIDGES—County Commissioners.—A bridge erected by one owning land on both sides of the stream, under a contract that the county would maintain the bridge, held subject to the control of the county commissioners.—Glenn v. Moore County Comrs., N. Car., 52 S. E. Rep. 58.

28. BROKERS—Employment of Sub-Agent.—Where negotiations for a lease are with a broker of the owner of the premises, the burden is on the subagent claiming commissions to show the broker's authority to employ him.—Southack v. Ireland, 95 N. Y. Supp. 621.

29. BROKERS—Inconsistent Employment.—A petition in action for breach of a contract for the services in the sale of real estate held not demurrable as showing a forfeiture by plaintiff by his acceptance of an inconsistent employment.—Shropshire v. Adams, Tex., 89 S. W. Rep. 440.

30. BUILDING AND LOAN ASSOCIATIONS—What Law Governs.—Where a mortgage bond provides that the obligation is a Georgia contract, to be construed by the laws of Georgia, application of payments must be made in accordance with such laws.—Equitable Building & Loan Assn. v. Corley, S. Car., 52 S. E. Rep. 48.

31. CARRIERS—Authority of Conductor.—Conductor of train held without implied authority to invite shipper of stock to ride in engine.—Illinois Cent. R. Co. v. Jennings, Ill., 75 N. E. Rep. 457.

32. CARRIERS—Boarding Street Car.—A passenger, intending to board an approaching street car, held guilty of contributory negligence in not taking a position outside the reach of the car as it approached the stopping place.—Neale v. Springfield St. Ry. Co., Mass., 75 N. E. Rep. 702.

33. CARRIERS—Care Required for Protection of Passengers.—An instruction as to the care required of a carrier is erroneous which does not require it to be "consistent with the practical operation of the road."—Tri-City Ry. Co. v. Gould, Ill., 75 N. E. Rep. 493.

34. CARRIERS—Concealment of Contents of Package.—A messenger company held not liable as a common carrier for the safe transportation of a package containing money, delivered without notice to the carrier of its contents.—Gilman v. Postal Telegraph Co., 95 N. Y. Supp. 564.

35. CARRIERS—Contributory Negligence.—It is not negligence *per se* to alight from a moving train in the darkness at the direction of the train officials, or in the belief that it had come to a stop.—Baltimore & O. S. W. R. Co. v. Mullen, Ill., 75 N. E. Rep. 474.

36. CARRIERS—Deviation in Transportation of Freight.—A carrier held liable for damages because of a deviation consisting in the delivery of freight to a connecting carrier before the terminus of the carrier's route had been reached.—Allen v. Wells Fargo & Co., 95 N. Y. Supp. 597.

37. CARRIERS—Duty Toward Passengers.—A person held a passenger on a street car, and the servants in charge of the car obliged to exercise the care required of common carriers.—Green v. Houston Electric Co., Tex., 89 S. W. Rep. 442.

38. CARRIERS—Injury to Alighting Passenger.—That the injuries to plaintiff by the alleged negligence of a carrier would not have happened to a younger person or one of less weight does not relieve defendant.—Staines v. Central R. Co. of New Jersey, N. J., 61 Atl. Rep. 885.

39. CARRIERS—Negligence in Leaving Switch Unlocked.—Whether failure of carrier to leave switch unlocked and unguarded was actionable negligence held a question for the jury.—Elgin, A. & S. Traction Co. v. Wilson, Ill., 75 N. E. Rep. 486.

40. CARRIERS—Punitive Damages for Failure to Stop at Station.—Where an engineer willfully passes a flag station, seeing a passenger standing there, the latter can recover punitive damages.—Milhouse v. Southern Ry., S. Car., 52 S. E. Rep. 41.

41. CARRIERS—Upsetting Tray on Passenger in Dining Car.—In a suit for injuries to a passenger by the upsetting of a tray over her clothing by another passenger in a dining car, whether the waiter was guilty of negligence in carrying the tray held a question for the trial judge, sitting without a jury.—Cassasa v. New York Cent. & H. R. R. Co., 95 N. Y. Supp. 648.

42. CHAMPERTY AND MAINTENANCE—Furnishing Proof in Divorce Case.—A contract between a husbamd and an attorney and a detective, relating to the procurement of a divorce for the husband, held champertous.—Barngrover v. Pettigrew, Iowa, 104 N. W. Rep. 904.

43. CHATTEL MORTGAGES—Description of Property.—A mortgage on "twelve acres of cotton" does not sufficiently specify the property, under Code 1895, § 2724.—Hampton v. State, Ga., 52 S. E. Rep. 19.

44. CIVIL RIGHTS—Exclusion of Negroes from Theaters.—In an action for the penalty imposed by Laws 1895, p 974, ch. 1042, for excluding citizens by reason of their color from theaters, certain evidence held admissible on the issue of defendant's intent in excluding a negress from his theater.—Thomas v. Williams, 95 N.Y. Supp. 592.

45. COMMON LAW—Marriage.—Only such part of the common law as was in force in North Carolina at the time the territory embraced in the state of Tennessee was ceded by North Carolina to the federal government was ever in force in Tennessee.—Smith v. North Memphis Sav. Bank, Tenn., 89 S. W. Rep. 392.

46. CONSTITUTIONAL LAW—Jury Trial.—A judgment founded on a state statute is not wanting in due process of law because the statute does not permit trial by jury—Marvin v. Trout, U. S. S. C., 26 Sup. Ct. Rep. 31.

47. CONSTITUTIONAL LAW—Self-Executing Provisions. —Provision of Const. Fla., art. 16, § 30, giving the legislature power to prevent unjust discrimination and excessive charges by public corporations, is self-executing as to contracts made after it went into effect.—Tampa Waterworks Co. v. City of Tampa, U. S. S. C., 26 Sup. Ct. Rep. 23.

48. CONSTITUTIONAL LAW—Sale of Goods in Bulk.—Sess. Laws 1903, p. 249, ch. 30, § 1, regulating the sale of stocks of merchandise in bulk, is not unconstitutional as class legislation.—Williams v. Fourth Nat. Bank, Okla., 82 Pac. Rep. 496.

49. CONSTITUTIONAL LAW—Taxation of Personal Property in Other State.—Due process of law is denied a Kentucky corporation by a tax assessed under St. Ky., § 4020, on its rolling stock, permanently located in another state.—Union Refrigerator Transit Co. v. Commonwealth of Kentucky, U. S. S. C., 26 Sup. Ct. Rep. 36.

50. CONTRACTS—Action for Breach.—A complaint alleging an agreement by defendants to purchase certain bonds from plaintiff at par, and that plaintiff was induced thereby to sell machinery and accept such bonds in part payment, sets out a valid contract showing mutuality and consideration. — Erie City Iron Works v. Thomas, U. S. C. C., S. D. N. Y., 139 Fed. Rep. 995.

51. CONTRACTS — Consideration. — Where a written agreement is an original and not a collateral one, within the statute of frauds, a consideration therefor need not be set out therein, but may be shown *aliunde*.—Dryden v. Barnes, Md., 61 Atl. Rep. 342.

52. CONTRACTS—Legislative Alteration of School Districts.—Contract obligations are not impaired by Laws Mich. 1901, Loc. Act No 315, by creation of school district to which was given property which had belonged to the districts from which it was created. — Attorney-General of State of Michigan v. Lowrey, U. S. S. C., 26 Sup. Ct. Rep. 27.

53. CONTRACTS—Public Policy.—Employment of a railroad's engineer to perform services for a firm in fulfilling a construction contract for the railroad held not contrary to public policy.—Condon v. Callahan, Tenn., 89 S. W. Rep. 400.

54. CONTRACTS — Statutory Remedies. — Contract between landowner and railroad relative to crossings and passageways held not abrogated by statute providing for railroad crossings in such sense as to require the landowner to proceed under the statute instead of on the contract —Baltimore & O. S. W. R. Co. v. Brubaker, Ill., 75 N. E. Rep. 523.

55. CORPORATIONS—Apparent Powers.—A corporation may confer upon its officer or agents larger powers than ordinarily belong to them by holding them out to the public as possessing such powers. — Carrington v. Turner, Md., 61 Atl. Rep. 324.

56. CORPORATIONS — Attacking Legality of Corporate Existence.—The legality of the existence of a corporation cannot be attacked in condemnation proceedings instituted by it, but only in a direct proceeding by *quo warranto*.—Eddleman v. Union County Traction & Power Co., Ill., 75 N. E. Rep. 510.

57. CORPORATIONS—Call and Sale of Stock. — Where a shareholder's stock in a corporation was wrongfully sold for nonpayment of a call, he was entitled to compel a reissuance of the certificate of the stock on payment of the call, interest, and costs to the date of tender of the call. —Wilson v. Duplin Telephone Co., N. Car., 52 S. E. Rep. 62.

58. CRIMINAL EVIDENCE—Proof of Testimony of Absent Witness.—On the absence of a witness testifying before the examining court, held proper to permit the person reducing his testimony to writing to read it on the trial.—Petty v. State, Ark., 89 S. W. Rep. 465.

59. CRIMINAL LAW — Election by Commonwealth. — Where two or more laws are violated by accused's act, the commonwealth may elect under which law it will prosecute. — Commonwealth v. Barbour, Ky., 89 S. W. Rep. 479.

60. CONSTITUTIONAL LAW — Impairment of Contract Obligations.—Tax bills issued by a city clerk in reliance on a decision of the Kansas City Court of Appeals held not contracts whose obligation was impaired by subsequent decision of the supreme court holding them invalid.—City of Sedalia, to Use of Sedalia Nat. Bank v. Donohue, Mo., 89 S. W. Rep. 886.

61. CRIMINAL TRIAL—Conduct of Sheriff.—Where the sheriff stated to the judge in the presence of the jury that the mother of the accused had requested her satchel to be brought into court, and that it contained a pistol, but the jury were instructed not to consider the incident, a refusal to declare a mistrial was proper.—Rawlins v. State, Ga., 52 S. E. Rep. 1.

62. CRIMINAL TRIAL—Defendant as Witness.—The trial judge should not, in his charge, impress the jury with the idea that the judge, because of the defendant's interest in the case, questioned his credibility.—Hampton v. State, Fla., 89 So. Rep. 421.

63. CRIMINAL TRIAL—Disorder in Court. — The failure of the court to interpose of its own motion in case of disorder by the spectators at the trial is not ground for reversal.—Rawlins v. State, Ga., 52 S. E. Rep. 1.

64. CRIMINAL TRIAL—Form of Verdict.—Verdict whereby jury "assess the punishment at $40" held not defective for omission of the word "fine." — State v. Jones, Mo., 89 S. W. Rep. 866.

65. CRIMINAL TRIAL — Improper Statements in Argument of Counsel.—Where a counsel in argument makes improper statements, and opponents ask for an instruction, which is given, a motion for a mistrial on the same ground should not be entertained.— Rawlins v. State, Ga., 52 S. E. Rep. 1.

66. CRIMINAL TRIAL—Statements by Court.—In a prosecution for homicide, it was improper for the court to state, on an objection to a question asked of a juror, that temporary insanity was not a defense for crime by that name.—Betts v. State, Tex., 89 S. W. Rep. 413.

67. DAMAGES — Fright Resulting in Neurasthenia.—Proof that neurasthenia may be caused by fright and terror held admissible where plaintiff was physically injured at the same time.—Elgin, A. & S. Traction Co. v. Wilson, Ill., 75 N. E. Rep. 436.

68. DEATH—Joint Tort Feasors. — Joint tort feasors may be joined in one suit for wrongful death, under Rev. Laws, ch. 171, § 2 —Oulighan v. Butler, Mass., 75 N. E. Rep. 726.

69. DEDICATION—Effect of Delay in Acceptance.—An acceptance by municipal authorities of a dedication, although not made until 10 years subsequent to the filing of the plat, is in time.—Backman v. City of Oskaloosa, Iowa, 104 N. W. Rep. 347.

70. DEEDS—Necessity of Seisin.—Conveyance by a disseisee is valid in the District of Columbia.—Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co., U. S. S. C., 26 Sup. Ct. Rep. 25.

71. DESCENT AND DISTRIBUTION—Construction of Will. —Where a will provided that certain property should be held in trust for testatrix's son, at his death the share to go to his heirs, at his death his widow, the share being personalty, became entitled to one-third.—Throp v. Throp, N. J., 61 Atl. Rep. 377.

72. DIVORCE—Res Judicata. — A decree that a prior judgment dissolving the marital relation between plaintiff and defendant was valid held conclusive on plaintiff.—Bidwell v. Bidwell, N. Car., 52 S. E. Rep. 55.

73. DIVORCE—Refusal to Pay Alimony.—Commitment for contempt for refusal to pay alimony held not authorized; the attorney demanding the payment not having shown authority.—Kalmanowitz v. Kalmanowitz, 95 N. Y. Supp. 627.

74. EASEMENTS — Boundaries. — The space between buildings through which a way to the land in the rear of the building exists does not define the boundaries of the way, but only the limits within which the way must be laid out.—O'Brien v. Murphy, Mass., 75 N. E. Rep. 700.

75. EJECTMENT—Defense of Outstanding Title.—Defendant in ejectment may show outstanding title in stranger.—McGuire v. Blount, U. S. S. C., 26 Sup. Ct. Rep. 1.

76. EJECTMENT—Voidable Tax Deed.—One who brings ejectment against a holder of a voidable tax deed may recover on showing that when defendant took possession plaintiff had for several years held peaceable possession under a claim of ownership.—Penrose v. Cooper, Kan., 81 Pac. Rep. 489.

77. ELECTIONS—Designation of Parties.—The name "Social Democratic Party" held substantially the same as "Democratic Party," and use thereof is prohibited by Election Law, § 56, Laws 1901, p. 1669, ch. 654 —*In re* Social Democratic Party, N. Y., 75 N. E. Rep. 415.

78. ELECTIONS—Preparation of Ballot.—That elector voting straight party ticket may prepare it more quickly than one who does not held not an interference with freedom of election, within Const., art. 1, § 5.—Oughton v. Black, Pa., 61 Atl. Rep. 846.

79. EMBEZZLEMENT—Evidence.—In prosecution for embezzlement of fee paid to attorney for procuring bondsmen, evidence that he has tried to procure the bondsmen held admissible.—State v. Jones, Mo., 89 S. W. Rep. 366.

80. EMBEZZLEMENT—Evidence.—On trial for embezzlement, proof that the money embezzled was received in several sums, at different times, and from different persons, will support a verdict finding the aggregate sum as the amount of a single embezzlement.—State v. Moyer, W. Va., 52 S. E. Rep. 30.

81. EMBEZZLEMENT—What Constitutes.—Where under a contract an agent is employed to collect money on commission, he must turn over the whole amount co lected before being entitled to commissions.—State v. Moyer, W. Va., 52 S. E. Rep. 30.

82. EMINENT DOMAIN—Appearance to Contest Merits of Condemnation.—A general appearance to a contest of the merits of a condemnation proceeding constitutes a waiver of error in denying a motion to quash the service of summons —Eddleman v. Union County Traction & Power Co., Ill., 75 N. E. Rep. 510.

83. EQUITY—Title to Land.—Courts of equity have at least concurrent jurisdiction with courts of law to adjudicate title to land.—O'Brien v. Murphy, Mass., 75 N. E. Rep. 700.

84. ESTOPPEL—Permitting Title in Another's Name.—Where a wife did not know that her husband had purchased property with her money in his own name, she was not estopped to assert title as against his creditors. —Mayer v. Kane, N. J., 61 Atl. Rep. 874.

85. EVIDENCE—Declarations of Vendor after Sale.—Declarations of a seller, made after the sale, not in the presence of or known to the buyer, held inadmissible to defeat the buyer's title.—Bruce v. Bruce, Tex., 89 S. W. Rep. 435.

86. EVIDENCE—Letters.—A letter, purporting to have been written by defendant to plaintiff, held admissible on proof that it was signed in defendant's name by its sales manager.—Garfield v. Peerless Motor Car Co., Mass., 75 N. E. Rep. 695.

87. EVIDENCE—Opinion of Expert.—It is not proper to permit a medical expert to give an opinion based on the testimony as he has construed it from having heard it.—Elgin, A. & S. Traction Co. v. Wilson, Ill., 75 N. E. Rep. 436.

88. EVIDENCE—Records of Fire Department.—The record of the fire department of a city, containing a report of a fire, held hearsay, in an action for damages for the fire caused by defendant's negligence.—Over v. Dehne, Ind., 75 N. E. Rep. 664.

89. EVIDENCE—Terms of Lease.—For a tenant, holding under a written lease, to recover on an alleged oral agreement of landlord to repair, the tenant must show that the agreement was collateral to the lease.—Greene v. Kerr, 95 N. Y. Supp. 569.

90. EVIDENCE—Written Contract.—Parol evidence held inadmissible to show that certain requirements were not included in a contract made by the conditional acceptance of plaintiff's bid.—Sundmacher v. Lloyd, Mo., 89 S. W. Rep. 368.

91. EXECUTORS AND ADMINISTRATORS—Effect of Discharge of Administrator.—County court held without jurisdiction to appoint another administrator *de bonis non* after the term at which a former administrator was discharged and the estate ordered closed.—Wallace v. Turner, Tex., 89 S. W. Rep. 432.

92. EXPLOSIVES—Negligence.—In an action for death by the explosion of certain powder magazines, defendant's negligence specified held efficient causes of the accident.—Oulighan v. Butler, Mass., 75 N. E. Rep. 726.

93. FEDERAL COURTS—Questions Reviewable.—Decision of state court construing state statutes so as to remove any question of repugnancy to the federal constitution cannot be reviewed by Supreme Court of the United States on writ of error.—Tampa Waterworks Co. v. City of Tampa, U. S. S. C., 26 Sup. Ct. Rep. 23.

94. FEDERAL COURTS—Decision on Non-Federal Grounds.—Supreme Court of United States can review by writ of error decision of state court sustaining a statute claiming to impair contract obligations.—Attorney General of State of Michigan v. Lowrey, U. S. S. C., 26 Sup. Ct. Rep. 27.

95. FIRE INSURANCE—Agents.—One who employs a broker to obtain insurance does not thereby incur any liability to pay the broker commissions.—Arndt v. Miller, Daybill & Co., 95 N. Y. Supp. 604.

96. FIRE INSURANCE—Assignment Before Loss.—A clause prohibiting the assignment of policy does not prohibit its transfer as collateral security.—Scottish-Union & National Ins. Co. v. Andrews & Matthews, Tex., 89 S. W. Rep. 419.

97. FIRE INSURANCE—Property Insured.—A policy insuring certain personal property under a trade name held not void because the property was owned distributively by certain persons doing business under such name.—New Hampshire Fire Ins. Co. v. Wail, Ind., 75 N. E. Rep. 668.

98. FRAUD—Ignorance of Truth of Representations.—One who makes representations, which he does not know to be true, to another, whom he knows has no knowledge as to the truth thereof, is guilty of fraud.—Western Cattle Brokerage Co. v. Gates, Mo., 89 S. W. Rep. 382.

99. FRAUDULENT CONVEYANCES—Limitations.—Suit to set aside a fraudulent conveyance held not barred, the debt not being barred, and adverse possession of the land not having been for the statutory period.—James v. Mallory, Ark., 89 S. W. Rep. 472.

100. GARNISHMENT—Construction of Statute.—While the garnishment statute is to be liberally construed, the remedy is purely legal, and every case must be brought within the scope of the statute.—Wheeler v. Chicago Title & Trust Co., Ill., 75 N. E. Rep. 455.

101. HABEAS CORPUS—Violation of Court's Order.—Where petitioner in *habeas corpus* proceedings for the custody of a child violated the order of court awarding her such custody by moving with the child into another county, respondent to the proceedings should have applied for relief to the court whose order was violated.—Willis v. Willis, Ind., 75 N. E. Rep. 655.

102. HOMICIDE—Criminal Negligence of Physician.—Where a physician treating a patient does nothing that a skilful person might not do, and death results merely from an error of judgment or an inadvertent mistake, the physician is not liable.—Hampton v. State, Fla., 39 So. Rep. 421.

103. HOMICIDE—Provoked Quarrel.—One who provokes a difficulty may defend himself against violence disproportionate to the seriousness of the provocation. —Sams v. State, Ga., 52 S. E. Rep. 18.

104. HOMICIDE—Specific Intent.—In murder in the first

degree, a specific intent to take life must be shown, while in murder in the second degree it is not necessary to prove such intent.—Petty v. State, Ark., 89 S. W. Rep. 465.

105. HUSBAND AND WIFE—Conveyance to Wife.—Where a husband conveys lands directly to his wife, he cannot convey the legal title to another, or incumber it by a deed of trust or otherwise.—Swiger v. Swiger, W. Va., 52 S. E. Rep. 28.

106. HUSBAND AND WIFE—Loss of Service.—In an action for alienation of affections of plaintiff's husband, an amendment to the complaint held not objectionable as materially changing the case made.—Gregg v. Gregg, Ind., 75 N. E. Rep. 674.

107. INDIANS—Lease of Lands.—Where a party holds a lease of Indian lands providing that he will not sublet without the approval of the secretary of the interior, a subletting without the consent of such secretary conveys no interest.—Reeves & Co. v. Sheets, Okla., 82 Pac. Rep. 487.

108. INDICTMENT AND INFORMATION — Following Language of Statute.—To render an indictment good by following the language of a statute, it must contain a statement of every necessary to constitute the offense.—Commonwealth v. Gregory, Ky., 89 S. W. Rep. 477.

109. INDICTMENT AND INFORMATION—Larceny.—Where an indictment for larceny lays the ownership of the goods in a firm, without stating the names of the partners, it is fatally defective.—Buffington v. State, Ga., 52 S. E. Rep. 19.

110. INDICTMENT AND INFORMATION — Joinder of Parties.—Principals and accessories before the fact may be joined in the same indictment, and in one count.—Rawlins v. State, Ga., 52 S. E. Rep. 1.

111. INFANTS—Appointment of Guardian Ad Litem.—While a guardian *ad litem* should be appointed by a formal order, yet the absence of such order is not fatal to his appointment where the fact of appointment appears by recitals or reference in the record. — Crane v. Stafford, Ill., 75 N. E. Rep. 424.

112. INJUNCTION—Trespass. — Inconvenience and annoyance, resulting from relatively harmless trespasses on real property, authorizes the issuance of an injunction to prevent their continued repetition.—O'Brien v. Murphy, Mass., 75 N. E. Rep. 700.

113. INSOLVENCY — Fraudulent Preferences.—A creditor, receiving a fraudulent transfer to secure in part a pre-existing debt, held not entitled to a lien to the amount of the loans made after the transfer and on the faith of it.—Bolster v. Graves, Mass., 75 N. E. Rep. 714.

114. JUDGES—Disqualification.—A judge who is a *quasi* party to a suit in a bill filed by plaintiffs, suing on behalf of themselves and others, similarly situated, and who will have the right to come into the suit, is disqualified.—City of Grafton v. Holt, W. Va., 52 S. E. Rep. 21.

115 JUDGES — Reargument After Term Expired. — Where a justice ordering reargument had been re-elected, and his term expired and new term commenced intermediate the order and the hearing, held that he had authority to proceed.—Jewett v. Schmidt, 95 N. Y. Supp. 631.

116. JUDGMENT—Entry Nunc Pro Tunc.—Where an infant, born after application for final judgment was submitted, was a necessary party, the court had authority to direct the entry of judgment *nunc pro tunc* in order to obviate any difficulty arising during the court's retention of the case for consideration.—Jewett v. Schmidt, 95 N. Y. Supp. 631.

117. JUDGMENT—Interrogatories.—Defendant held not entitled to a judgment on interrogatories based on complaint, notwithstanding the general verdict disregarding answers to interrogatories on cross-complaint.—New Hampshire Fire Ins. Co. v. Wall, Ind., 75 N. E. Rep. 668.

118. JUDGMENT—Merger of Cause of Action.—Where a note is merged in a judgment, the ownership of the note and the running of limitations against the same are immaterial issues in an action based on a claim of subrogation to the lien of the judgment. — Brown v. Rash, Tex., 89 S. W. Rep. 438.

119. JUDGMENT—Res Judicata. — A judgment for defendants, in an action by a widow, under the dram shop act, is not a bar to an action by the children.—Stecher v. People, Ill., 75 N. E. Rep. 501.

120. JUDICIAL SALES—Laches.—One seeking to set aside a judicial sale on the ground of fraud is not chargeable with laches until he has acquired knowledge of the facts or of circumstances sufficient to charge him with such knowledge.—Mansfield v. Wallace Ill., 75 N. E. Rep. 662.

121. JUDICIAL SALES—Technical Objections.—Technical objections to regularity of judicial sale during Spanish control of Florida will not be permitted to defeat the sale and conveyance thereunder, where sale has been held sufficient to convey title by commissioners appointed under Act Cong. May 8, 1822, ch. 129, 3 Stat. 709.—McGuire v. Blount, U. S. S. C., 26 Sup. Ct. Rep. 1.

122. JURY—Challenges by State.—Where two are tried jointly for a capital offense, and neither waives his peremptory challenges, the state is entitled to one-half of the number of challenges allowed to both. — Rawlins v. State, Ga., 52 S. E. Rep. 1.

123. JURY—Garnishment Proceedings.—A demand for a jury trial by claimants of credits garnished in a police court, made at the time claimants appealed to the superior court, was in time.—Hubbard v. Lamburn, Mass., 75 N. E. Rep. 707

124. LANDLORD AND TENANT—Notice to Quit.—Where no objection to the introduction of a notice to quit signed by the landlord's attorneys was made, the tenant thereby conceded that the attorneys were authorized to give the notice.—McClung v. McPherson, Oreg., 81 Pac. Rep. 567.

125. LIFE ESTATES—Rights of Life Tenant.—A life tenant held not authorized to mine subsurface minerals in the land during his life estate; his predecessor in title not having so used the premises.—Hill v. Ground, Mo., 89 S. W. Rep. 343.

126. LIFE INSURANCE—Sufficiency of Notice of Time for Paying Premium.—Prefixing the words, "the conditions of your policy provide," to the notice of the time for payment of premium required by Laws N. Y. 1892, ch. 690, § 92, held not to render such notice insufficient as a basis for forfeiture for nonpayment.—Nederland Life Ins. Co. v. Meinert, U. S. S. C., 26 Sup. Ct. Rep. 15.

127. LIMITATION OF ACTIONS—Anticipation of Defenses. —Where a complaint alleged facts excusing failure to sooner institute the action, an answer alleging such failure is demurrable.—Ausplund v. Ætna Indemnity Co., Oreg., 81 Pac. Rep. 577.

128. MARRIAGE—Civil Contract. — Marriage is a civil contract, and it is not indispensable that the minister should be present to confirm the contract.—Reaves v. Reaves, Okla., 82 Pac. Rep. 490.

129. MASTER AND SERVANT — Damages for Wrongful Discharge.—The money earned by an employee wrongfully discharged, made in doing other work during the term of the employment, must be considered in determining his loss.—Tenzer v. Gilmore, Mo., 89 S. W. Rep. 341.

130. MASTER AND SERVANT — Defective Appliances.—Where plaintiff undertook to operate faster a stamping machine, on defendant's promise to repair as soon as certain work was done, defendant cannot escape liability because the promise was indefinite.—Anderson v. Seropian, Cal., 81 Pac. Rep. 521.

131. MASTER AND SERVANT—Defective Appliances.—The rule, relieving an employer buying appliances from a reputable dealer, held not to apply where on a superficial examinatian the weakness of the appliances was discoverable.—Feeney v. York Mfg. Co., Mass., 75 N. E. Rep. 733.

132. MASTER AND SERVANT—Notice of Defective Car Coupling.—In order to charge a railroad company with notice of a defective car, it is not necessary that such notice be given to the particular official designated by

its rules.—Chicago & A. Ry. Co. v. Walter, Ill., 75 N. E. Rep. 441.

133. MASTER AND SERVANT — Defective Platform. — Where a master has furnished reasonable material for a movable platform built by the men constructing the embankment, he has fulfilled his duty.—Fukare v. Kerbaugh, N. J., 61 Atl. Rep. 876.

134. MASTER AND SERVANT—Extra Compensation.—A servant regularly employed at a stipulated compensation held not entitled to recover for extra services; no remuneration being contracted for.— Murray v. John Griffiths & Son, 95 N. Y. Supp. 573.

135. MASTER AND SERVANT—Fellow Servants.—Where an act or omission that caused the injury to a servant pertained to the duty of an operative, the employee performing it was a fellow servant.— Larsen v. LeDoux, Idaho, 81 Pac. Rep. 600.

136. MASTER AND SERVANT — Liability for Injury to Third Person.—The proprietor of a saloon held liable for injury to a customer by a servant serving a drugged drink.—Tway v. Salvin, 95 N. Y. Supp. 653.

137. MASTER AND SERVANT—Mental Capacity of Servant.—In an action for injuries to a servant, question of servant's mental capacity, etc., may be considered on the issues of assumed risk and contributory negligence. —Drake v. San Antonio & A. P. Ry. Co., Tex., 89 S. W. Rep. 407.

138. MASTER AND SERVANT — Negligence. — Where a servant did not know all the facts, and the master knew of the danger and did not warn him, then the master would be responsible for any injury. — Consolidated Kansas City Smelting & Refining Co. v. Sharber, Kan., 81 Pac. Rep. 476.

139. MASTER AND SERVANT—Negligence of Foreman.— Foreman of a switching crew held guilty of negligence in failing to revoke an order given for certain switching.—Kennedy v. Kansas City, St. J., etc., R. Co., Mo., 89 S. W. Rep. 370.

140. MASTER AND SERVANT—Safe Place to Work. —A master must take reasonable care to supply a reasonably safe place for his servant to work, and whether he has done so is for the jury.—Kalker v. Hedden, N. J., 61 Atl. Rep. 895.

141. MASTER AND SERVANT—Safe Place to Work.—The duty a railroad company engaged in repairing its track owes to a brakeman engaged in shifting cars is to provide rules for his protection.—Smith v. Boston & M. R. R., N. H., 61 Atl. Rep. 859.

142. MASTER AND SERVANT—Wrongful Discharge. —It is a good defense to an action for wrongful discharge of a servant that he disobeyed orders to attend his employers' store at 8 o'clock in the mornings.—Costet v. Jeantet, 95 N. Y. Supp. 638.

143. MORTGAGES — Deed from Trustee. — Deed from trustee in mortgage conveys whatever title he had. — Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co., U. S. S. C., 26 Sup. Ct. Rep. 25.

144. MORTGAGES—Foreclosure.—A mortgagor who has conveyed his equity of redemption has no interest in an action to foreclose the mortgage, and is not a necessary party defendant.—Bernard v. Shemwell, N. Car., 52 S. E. Rep. 64.

145. MORTGAGES — Rights of Purchaser under Foreclosure Sale.—On foreclosure sale, the purchaser is not entitled to the rents and profits during the period of redemption, though there is an express provision to that effect in the trust deed.—Schaeppi v. Bartholomæ, Ill. 75 N. E. Rep. 447.

146. MORTGAGES — Time in Which Second Mortgagee may Redeem.—Time for second mortgagee to redeem on foreclosure of first mortgage must be reasonable, and, if not, will be extended by supreme court.—Rodman v. Quick, Ill., 75 N. E. Rep. 465.

147. MUNICIPAL CORPORATIONS—Confirmation of Bond Issue.—If an election to determine the issuance of bonds was legally held, a failure to provide for their payment before proceedings to validate the issue would not prevent a judgment of confirmation.—Oliver v. City of Elberton, Ga., 52 S. E. Rep. 15.

148. MINES AND MINERALS—Construction of Lease.—A finding in an action for rent under a lease of oil and gas land held not a finding of such part performance as prevents the lessee from exercising the right to terminate the lease.—Hancock v. Diamond Plate Glass Co., Ind., 75 N. E. Rep. 659.

149. MUNICIPAL CORPORATIONS—Obstruction in Street. —A city held not liable for collision of a vehicle with an obstruction in the street; it having put a proper light thereon, and not having notice that it was taken away.— Gedroice v. City of New York, 95 N. Y. Supp. 645.

150. NEGLIGENCE—Directed Verdict. — Where all reasonable minds would, on certain admitted facts, agree that an injury was the result of plaintiff's negligence, the court may direct a verdict for plaintiff.—Hewes v. Chicago & E. I. R. Co., Ill., 75 N. E. Rep. 515.

151. NEGLIGENCE—Fright Resulting in Injury.—A cause of action exists for fright caused by the wrongful act of another resulting in physical injuries.—Hendrix v. Texas & P. Ry. Co., Tex., 89 S. W. Rep. 461.

152. NEGLIGENCE—Prior Physical Condition Affecting Personal Injury.—A plaintiff, in an action for personal injury negligently inflicted, held entitled to recover for an injury only aggravating a previously diseased condition.—Green v. Houston Electric Co., Tex., 89 S. W. Rep. 442.

153. PLEADING—Sufficiency of Petition.—In determining whether any one or more of the counts of a petition state a good cause of action, all the facts stated will be considered together. — McClung v. Cullison, Okla., 82 Pac. Rep. 499.

154. REMOVAL OF CAUSES — Jurisdiction of Federal Court.—A petition for removal, filed by trustees of an unincorporated association, brought in as defendants in a suit against the association, by order of the court, after the service of process on them, held to have been in time.—Robert v. Pineland Club, U. S. C. C., D. S. Car. 139 Fed. Rep. 1001.

155. SALES—Assignment.—Where vendor on a conditional sale has delivered possession and assigns the contract to a third party, the assignee cannot have an attachment on failure of the purchaser to make a payment.— Barton v. Groseclose, Idaho, 81 Pac. Rep. 628.

156. TRIAL—Special Findings.—An itemized statement, made by the court, of the damages awarded to plaintiff from fire set by sparks from defendant's foundry, held not to make the finding of damages a special finding.— Over v. Dehne, Ind., 75 N. E. Rep. 684.

157. USURY—Limitations.—Where there is a series of usurious transactions, the statute of limitations does not begin to run until the transactions are closed.—Slover v. Union Bank, Tenn., 89 S. W. Rep. 399.

158. VENDOR AND PURCHASER—Bona Fide Purchasers. —The record of deed of F to R of land owned by the state, equitable title to which R afterwards acquires, held not notice to purchasers from C after patent was issued to him.—Rozell v. Chicago Mill & Lumber Co., Ark., 89 S. W. Rep. 469.

160. VENDOR AND PURCHASER—Time for Performance in Contract for Sale of Land.—Where a contract for sale of land fails to specify time for performance, the law will imply a reasonable time, and the contract may be specifically enforced.—Ullsperger v. Meyer, Ill., 75 N. E. Rep. 482.

161. WAREHOUSEMEN— Action on Receipt. — A warehouse receipt in the hands of a subsequent *bona fide* holder held not subject to the defense that it was issued by mistake.—Star Compress & Warehouse Co. v. Meridian Cotton Co., Miss., 39 So. Rep. 417.

162. WITNESSES — Conversations with Deceased Persons.—Plaintiffs having introduced evidence concerning conversations between defendant and certain persons since deceased, defendant could testify with reference thereto.—Hurd v. Fleck, Colo., 82 Pac. Rep. 485.